

DIVISION IV

ARKANSAS COURT OF APPEALS  
NOT DESIGNATED FOR PUBLICATION  
JOSEPHINE LINKER HART, Judge

CACR05-1296

December 13, 2006

CHRISTOPHER CHARLES  
YARBROUGH

APPELLANT

V.

APPEAL FROM THE CRAWFORD  
COUNTY CIRCUIT COURT  
[NO. CR 2003-514-B]

HON. GARY RAY COTTRELL,  
CIRCUIT JUDGE

STATE OF ARKANSAS

REVERSED AND DISMISSED

APPELLEE

Christopher Charles Yarbrough was convicted in a Crawford County jury trial of possession of marijuana with intent to deliver and possession of drug paraphernalia, for which he received sentences of sixty and thirty-six months respectively in the Arkansas Department of Correction, to be served consecutively. On appeal, he argues that his right to a speedy trial was violated and that the trial court erred in denying his motion to suppress physical evidence seized in a traffic stop. We hold that Yarbrough's right to a speedy trial was violated; therefore, we reverse and dismiss.<sup>1</sup>

On November 1, 2004, Yarbrough filed a motion to dismiss for lack of speedy trial. It was undisputed that Yarbrough made a prima facie case that he was not tried within twelve

---

<sup>1</sup> Because we are reversing and dismissing this case due to the violation of Yarbrough's right to a speedy trial, we will not address his second point.

months of his October 30, 2003, arrest. The State, however, argued that two periods of time should be charged to Yarbrough.

The first period, some twelve days, was the time between Yarbrough's scheduled arraignment, for which he was late, and when his rescheduled arraignment was held. Because Yarbrough was late, a Failure to Appear Warrant was issued. However, the warrant was recalled later that day when Yarbrough arrived in court. When the warrant was recalled, Yarbrough was found in contempt and fined \$200, and ordered to appear on December 29, 2003, for arraignment.

The second period of time, some forty-eight days, was the time between when Yarbrough's trial counsel, pursuant to the circuit court's procedures and specific direction<sup>2</sup>, asked in writing to be excused from a "Plea or Trial Request" hearing set for July 7, 2004, and a mandatory appearance set for August 9, 2004. When Yarbrough's trial counsel asked to be excused, he asked at the same time that the matter be set for trial, thus obviating his need to attend the hearing. When the case coordinator, over her signature, sent written notice of the August 9, 2004, mandatory hearing, there was a notation after the date and time of the hearing that stated: "*(Time excluded)*".

---

<sup>2</sup> The written notice to Yarbrough's trial counsel stated in pertinent part: NOTE: Neither Counsel nor Defendants will be required to appear on this date IF the attorney has submitted to the Court, at *least two (2) days* prior to the Plea/Trial Request Date, a *written* request to be excused which also advises the Court whether their client is requesting a trial date or wishes to enter a change of plea. (Emphasis in original.)

On appeal, Yarbrough argues that the trial court erred in denying his motion to dismiss the case against him due to violation of the speedy-trial rules. He asserts that the trial court erred in excluding the first period of time because Rule 28.3 of the Arkansas Rules of Criminal Procedure expressly allows the exclusion of time when the period of delay resulting from his absence only when “his whereabouts are unknown.” Yarbrough notes that he was merely late for his arraignment and that the Failure to Appear warrant was recalled later that same day. Furthermore, he argues that “no notation was made on the docket or in the record at the time that the Court considered this to be an excluded period of time.” Regarding the second period of excluded time, he asserts that his trial counsel’s request to be excused was “in no way” a request for a continuance, and it did not disturb the trial settings for the week of August 23 and September 7, 2004, when the case should have been tried. We find these arguments persuasive.

Under Rule 28.1 of the Arkansas Rules of Criminal Procedure, a defendant must be brought to trial within twelve months unless there are periods of delay that are excluded under Rule 28.3. *Gondolfi v. Clinger*, 352 Ark. 156, 98 S.W.3d 812 (2003). In pertinent part, Rule 28.3(e) of the Arkansas Rules of Criminal Procedure allows to be excluded:

The period of delay resulting from the absence or unavailability of the defendant. A defendant shall be considered absent whenever his whereabouts are unknown. A defendant shall also be considered unavailable whenever his whereabouts are known but his presence for the trial cannot be obtained or he resists being returned to the state for trial.

If a defendant is not brought to trial within the requisite time, the defendant will be discharged, and such discharge is an absolute bar to prosecution of the same offense and any other offense required to be joined with that offense. Ark. R. Crim. P. 30.1. Once the defendant presents a *prima facie* case of a speedy-trial violation, *i.e.*, that the trial is or will be held outside the applicable speedy-trial period, the State has the burden of showing that the delay was the result of the defendant's conduct or was otherwise justified. *Ferguson v. State*, 343 Ark. 159, 33 S.W.3d 115 (2000).

We hold that Yarbrough's right to a speedy trial was violated. Regarding the first period of excluded time, it is clear that the trial court delayed his arraignment when he failed to arrive at court on time. However, Rule 28.3 (e) expressly conditions excluding the time on either a defendant's whereabouts being unknown or his resisting apprehension or being returned from out-of-state for trial. Neither condition is present here, save for, at most, a few hours. Because we strictly construe our rules of criminal procedure, *see Daffron v. State*, 318 Ark. 182, 885 S.W.2d 3 (1994), we must reject the exclusion of this time. Further, the trial court administered punishment for Yarbrough's tardiness, but did not make a record or docket notation that his delay would result in any excluded time for speedy trial.

We also agree that the trial court erred in excluding the second period of time, the forty-eight days between when Yarbrough's trial counsel exercised the option to be excused from a "Plea or Trial Request" hearing and his mandatory appearance set for August 9, 2004.

The time in question does not qualify as a request for a continuance as contemplated under Rule 28.3(c), which in pertinent part defines as excludable:

(c) The period of delay resulting from a continuance granted at the request of the defendant or his counsel. All continuances granted at the request of the defendant or his counsel shall be to a day certain, and the period of delay shall be from the date the continuance is granted until such subsequent date contained in the order or docket entry granting the continuance.

The time in question did not delay any proceedings, and in fact, by opting not to appear, Yarbrough's trial counsel probably expedited matters. We hold as a matter of law that the trial court erred in excluding these forty-eight days. Furthermore, we note that the docket sheets lack the entry required by Rule 28.3(c).

Because it was error to exclude these two periods of time, we hold that Yarbrough's right to a speedy trial was violated, and we reverse and dismiss Yarbrough's conviction. Ark. R. Crim. P. 28.1(b).

Reversed and dismissed.

GRIFFEN and BIRD, JJ., agree.